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No. 77-1750

In the Supreme Court of the United States

OCTOBER TERM, 1978

MICHIGAN NATIONAL BANK, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

CARIN ANN CLAUSS,
Solicitor of Labor,

DONALD S. SHIRE,
Associate Solicitor,

SANDRA K. WEBB,
PETER B. DOLAN,
Attorneys,
Department of Labor,
Washington, D.C. 20210.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not reported. The opinion of the district court (Pet. App. 4a-16a) is not reported.

JURISDICTION

The court of appeals entered its judgment on February 10, 1978, and denied rehearing on April 6,

1978. The petition for a writ of certiorari was filed on June 9, 1978. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in an action to redress violations of the Equal Pay Act the court of appeals correctly held that petitioner is not entitled to learn in discovery proceedings which of his employees has given information to the Department of Labor concerning the job duties and wages in issue.

STATUTE INVOLVED

The Equal Pay Act of 1963, enacted as a provision of the Fair Labor Standards Act, 77 Stat. 56, 29 U.S.C. 206(d), provides in relevant part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, that

> an employer who is paying a wage rate differential in violations of this subsection shall not, in order to comply with the provisions of the subsection, reduce the wage rate of any employee.

STATEMENT

The Secretary brought this action against petitioner, a banking corporation that operates a credit card business, asserting that it had violated the Equal Pay Act by paying its male credit card account collectors at a higher wage rate than it paid female collectors for work equal within the meaning of the Act (A. 6).[1] The petitioner denied the violations charged and served interrogatories asking the Secretary to identify those of petitioner's employees who had given information to the Department concerning their employer's pay practices (A. 8, 9, 11; Interrogatories 2(e) and 10). On the basis of a formal claim of privilege, the Secretary declined to submit those names (A. 46-47). The affidavit of the Acting Wage and Hour Administrator in support of the claim stated that because of possible retaliation by an employer, workers "frequently refuse or are reluctant to give information concerning violations of the Act unless they receive assurance that their identities * * * will not be disclosed" (A. 49). The Acting Administrator explained that if the Department could not assure such employees of confidentiality, "full and

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[1] "A." references are to the joint appendix filed in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

free disclosure of violations of the Act" would be seriously impeded, to the detriment of the public interest (*ibid.*).

In moving to compel answers to those interrogatories, the only specific need mentioned by petitioner was that it required the names in order "to determine the grounds of the alleged discrimination" (A. 18), although petitioner admitted in its motion that "[w]e do know the identity of most, if not all, of the employees * * * interviewed" (A. 18).

The district court granted petitioner's motion and ordered the Secretary to submit the names of all employees and former employees from whom the Department had obtained information relating to the violations charged in the lawsuit (A. 60, 62).[2] The Secretary requested the court to reconsider its ruling and suggested as an alternative that the court require disclosure of the identity of only those employees who might consent to the disclosure (A. 13). The Secretary thereafter provided petitioner with the names of 24 persons who had consented to be identified and expressed his readiness to disclose near the time of trial a list of persons the plaintiff intended to call as witnesses (A. 75, 78). Because the Secretary continued to assert the privilege with respect to the 30 employees who had given information to the Department but who had not consented to be identified, the district court dismissed the action (A. 80-81).

[2] The district court denied petitioner's request for statements given by its employees to the Department (A. 50-51, 55-56, 80). That ruling was not at issue in the court of appeals and petitioner does not raise it here.

The court of appeals reversed. It held that the order requiring the Secretary to provide petitioner with the names of all its present and former employees who had given information was contrary to its decision in *Dunlop* v. *Carriage Carpet Co.*, 548 F.2d 139, 145 (C.A. 6), which recognized the established application of the informer's privilege in Fair Labor Standards Act cases (Pet. App. 1a). The court of appeals further provided that, at least 30 days preceding trial, the Secretary shall furnish petitioner with a list of any employees or former employees whom it expects to call as trial witnesses (*ibid.*).

ARGUMENT

Contrary to petitioner's assertion (Pet. 6), the holding of the court below that the Secretary may withhold in discovery proceedings the names of persons who have given information to the Department concerning violations of the Act creates no conflict with the other courts of appeals that have considered the question. Nor does it conflict with this Court's decision in *Roviaro* v. *United States*, 353 U.S. 53; on the contrary, the principles of that case fully support the decision below. There is, therefore, no need for further review by this Court.

The decision of the court below is in accord with settled authority that the Secretary of Labor may not be compelled in discovery to inform the employer

which of its employees has given the Department information regarding the employer's possible noncompliance with statutory wage standards. Indeed, it is the sixth court of appeals to so hold. See, *e.g.*, *Mitchell* v. *Roma*, 265 F.2d 633 (C.A. 3); *Wirtz* v. *BAC Steel Products, Inc.*, 312 F.2d 14 (C.A. 4); *United States* v. *Hemphill*, 369 F.2d 539 (C.A. 4); *Wirtz* v. *Continental Finance*, 326 F.2d 561 (C.A. 5); *Hodgson* v. *Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303 (C.A. 5); *Brennan* v. *Engineered Products, Inc.*, 506 F.2d 299 (C.A. 8); *Usery* v. *Ritter*, 547 F.2d 528 (C.A. 10).[3]

Petitioner mistakenly asserts that these decisions hold that the Secretary must disclose names of employees whom the Department has interviewed (Pet. 6). What petitioner fails to note is that, in those cases, the Secretary had voluntarily provided either the names of persons who had consented to be iden-

[3] The Ninth Circuit's *per curiam* decision in *Wirtz* v. *Rosenthal*, 388 F.2d 290, does not conflict with the decision below. *Rosenthal* merely affirmed a district court order that the Secretary provide the employer with the names and any statements of employees whom the Secretary would call as witnesses. The court of appeals here likewise provided for the disclosure of the witnesses shortly before trial (Pet. App. 1a). Accord, *Engineered Products, supra*, 506 F.2d at 304; *Wirtz* v. *Hooper-Homes Bureau, Inc.*, 327 F.2d 939, 954 (C.A. 5). *Rosenthal* "[e]xpressly excluded" from disclosure the employees whom the court of appeals here held need not be identified as having given information: employees whom the Secretary would not call as witnesses. 55 CCH Lab. Cas. ¶ 31,945. The *Rosenthal* court did not disagree with the principles set forth in prior decisions of other circuits; nor have subsequent decisions disagreed with *Rosenthal*. See Pet. App. 1a; *Usery* v. *Ritter, supra; Engineered Products, supra.*

tified[4]—as was done in the instant case (A. 76-78)—or the names of all persons the Secretary believed to have any knowledge of the disputed wage practices, including all employees affected by the practice, whether or not the listed employee had provided information to the Secretary.[5] In no instance did the Secretary reveal the identities of confidential informants, and each of those decisions plainly sustained the Secretary's privilege.

Petitioner correctly points out that the privilege is not unqualified (Pet. 7). Thus, it is necessary to balance the defendant's need for information in order to prepare its case against the public interest in protecting the flow of information concerning violations of the law. *Roviaro* v. *United States*, 353 U.S. 53, 61. The ruling of the court of appeals in the instant case reflects a proper balance of those considerations.[6]

The issue in this case is whether the men and women who worked for petitioner as credit account collectors were doing equal work and, if so, whether they were paid equal wages under the Act. Petitioner

[4] See *Usery* v. *Ritter, supra*, 547 F.2d at 530, 532; *Brennan* v. *Engineered Products, supra*, 506 at 301-302 and n. 1; *Hodgson* v. *Charles Martin Inspectors of Petroleum, Inc., supra*, 459 F.2d at 304, 307.

[5] See *United States* v. *Hemphill, supra*, 369 F.2d at 541, 542; *Wirtz* v. *Continental Finance, supra*, 326 F.2d at 563; *Wirtz* v. *BAC Steel Products, supra*, 312 F.2d at 15.

[6] The court of appeals' ruling requires the Secretary to provide petitioner with a list of prospective trial witnesses before trial, a practice the Secretary routinely follows (Pet. App. 1a; A. 78).

is well situated to determine the dispositive facts. The duties of male and female credit account collectors and the wage rates paid for the performance of those duties are matters which are particularly within petitioner's own knowledge as the employer. It necessarily knows which persons have relevant knowledge of the jobs and wages in question: the collectors themselves, petitioner's own supervisors and managers, and the Department's compliance officer (A. 12-14). The Secretary has, in addition, specified the employees affected by the suit, as well as the relevant time period (A. 14). Petitioner is free to depose and to produce as witnesses any of those persons having knowledge of the facts at issue in this case. The names of particular employees who provided information to the Department are simply irrelevant. See *Wirtz* v. *Robinson & Stephens, Inc.*, 368 F.2d 114, 115 (C.A. 5), and cases cited at page 6, *supra*.

While petitioner has no apparent legitimate interest in ascertaining which of its employees provided information to the government, the public interest in ensuring the flow of information to the Department of Labor is significant. Thus, in *Dunlop* v. *Carriage Carpet*, *supra*, the Sixth Circuit noted that Congress had eschewed "detailed federal supervision" as the method of securing compliance with the Fair Labor Standards Act and has chosen instead to rely on information and complaints received from employees. 548 F.2d at 145. It is critical to this enforcement method that an employee's economic dependence upon his employer not impede his willingness to approach

officials with wage law grievances, for, as this Court has held, "it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." *Mitchell* v. *DeMario Jewelry Co.*, 361 U.S. 288, 292.

In a parallel situation, this Court recently endorsed that rationale for the privilege. In *National Labor Relations Board* v. *Robbins Tire & Rubber Co.*, No. 77-911, decided June 15, 1978, the Court explained that, because of the employer's "intense leverage" over the employment relationship, employee witnesses are " 'especially likely to be inhibited' " by fear of harassment. Slip op. 25. The Court recognized that both employees and nonemployees may be reluctant to give statements to enforcement agency representatives in the absence of effective assurance that, unless called as witnesses, their statements will not be disclosed (*ibid.*). The fact that the Fair Labor Standards Act prohibits an employer from discriminating against employees who cooperate with the Department [7] does not diminish the need for the privilege against disclosure of informants, for a "*post hoc* disciplinary action is no substitute for a prophylactic rule that prevents the harm" altogether. Slip op. 25.

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[7] 29 U.S.C. 215(a)(3).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

CARIN ANN CLAUSS,
Solicitor of Labor,

DONALD S. SHIRE,
Associate Solicitor,

SANDRA K. WEBB,
PETER B. DOLAN,
Attorneys,
Department of Labor.

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